No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK,

Petitioner,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF CONGRESSMAN STEVE KING, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION & CIVIL JUSTICE, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES; AND CONGRESSMAN KEVIN CRAMER, IN SUPPORT OF PETITIONER

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BRIEF OF THE HONORABLE STEVE KING AND THE HONORABLE KEVIN CRAMER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER ROSE MARY KNICK

The Honorable Steve King, Chairman, Subcommittee on the Constitution & Civil Justice, Committee on the Judiciary, U.S. House of Representatives, and the Honorable Kevin Cramer, have received the consent of the parties to file this brief as *amici curiae* through letters of consent filed with the Clerk of the Court.[1]

INTEREST OF *AMICI CURIAE*

The jurisdiction of the House Subcommittee on the Constitution & Civil Justice includes the constitutional protection of private property rights. It is with an appreciation of the gravity of this appeal that Chairman King and Congressman Cramer submit this brief to respectfully urge the Court to reverse the decision of the Third Circuit in a manner that will restore the right of property owners to have Fifth Amendment taking claims adjudicated on the merits in the federal courts. The Subcommittee determined several years ago that this right is being severely restricted if not extinguished by the current application of the so-called "state court requirement" of this Court's

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Blanket consents by both parties are on file with the Court.

1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172.

SUMMARY OF ARGUMENT

At various times during the past twenty years, the Subcommittee on the Constitution and Civil Justice of the Judiciary Committee of the U.S. House of Representatives has inquired into the impact of this Court's requirement, formulated in 1985 in *Williamson County*, that property owners must pursue taking claims in State court before their Fifth Amendment taking claims may be adjudicated by a federal court. Subcommittee members have repeatedly expressed concern that *Williamson County* has consistently denied property owners the ability to have a federal court determine the merits of a Fifth Amendment taking claim. In 2000, the Subcommittee and the House of Representatives passed H.R. 2372, the Private Property Rights Implementation Act of 2000, in order to "simplify and expedite access to the federal courts," but without altering substantive Fifth Amendment takings claim standards. In 2005, the Subcommittee, the Hon. Steve Chabot, Chair, submitted an amicus brief in support of the petitioners in *San Remo Hotel, L.P. et al. v. City and County of San Francisco*, 545 U.S. 323 (2005), urging overruling of *Williamson County*'s state court litigation requirement. In more recent years, members of Congress have continued to express concern that *Williamson County* is restricting and obstructing private property rights, proposing the Private Property Rights Implementation Act of 2006 (H.R. 4772), and the Property Owners Access to Court Act of 2010 (H.R. 5624), each of which proposed a procedural fix to the *Williamson County*

state court requirement. In addition, this Court's ruling in *Kelo v. New London*, 545 U.S. 469 (2005), allowing the use of eminent domain in aid of private economic development, has exacerbated concerns among these *amici curiae* regarding the treatment of property owners by the federal courts.

The *amici curiae* in the instant case respectfully submit that this Court should resolve the current conflict among the federal courts regarding access to the federal courts in a manner that eliminates or at least mitigates the obstacles that have resulted from *Williamson County*, and provides guidance to Congress regarding the Supreme Court's understanding of the current scope of property rights protection.

ARGUMENT

THIS COURT SHOULD RESOLVE THE CONFLICTING INTERPRETATIONS OF *WILLIAMSON COUNTY* IN A MANNER THAT RESTORES THE RIGHT OF PROPERTY OWNERS TO PURSUE TAKING CLAIMS IN FEDERAL COURT, AND PROVIDES CONGRESS WITH GREATER GUIDANCE REGARDING CONSTITUTIONAL PROTECTIONS OF PROPERTY RIGHTS.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner *cannot* claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." 473 U.S. at 195 (emphasis added). This Court did not say that the

federal taking claim co-existed from the outset with the state claim, or that the plaintiffs in *Williamson County* were simply in the wrong forum. Rather, the Court held that a property owner *cannot* bring a federal taking claim until that claim has been litigated in state court and just compensation has been denied. In 1999, this Court reaffirmed this interpretation, holding in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999), that a Fifth Amendment taking claim "does not accrue" until state law and procedures have been utilized.

Williamson County, however, has caused a crisis in procedural takings law, because federal judges have interpreted it so as to avoid addressing the merits of federal takings claims. From 1997 to 2000, the Subcommittee conducted an inquiry into the impact of *Williamson County* on the rights of property owners under the Fifth Amendment's Taking Clause. The Subcommittee was provided with credible research that in 94 percent of all takings cases litigated between 1983 and 1988,[2] and in 83 percent of the takings claims initially raised in the federal district courts from 1990 to 1998, the federal court never reached the merits of the property owner's claim of a taking without just compensation.[3] Of those property owners who could

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[2] *See* H.R. Rep. No. 106-518, at 10 *citing* G. Overstreet, "The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions," 10 J. Land Use & Envtl. L. 91, 92 n.3 (1994).

[3] *See ibid*, *citing* J. Delaney and D. Desiderio, "Who Will Clean Up the 'Ripeness Mess'? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse," 31 Urb. Law. 195, 202-231 (1999), at 196.

afford to appeal their cases through the state courts and then proceed in federal court, 64 percent still failed to have their claims resolved on the merits. Moreover, in that small portion of appellate cases where a federal court found a takings claim to be procedurally ripe *and* addressed the merits, it took property owners "on the average, 9.6 years to have an appellate court reach its determination."[4] And these statistics do not address the low income or middle class property owners who, in the face of the expensive procedural challenges that stand between them and a federal forum on the merits of their federal civil rights claims, are too intimidated to even start down the long road to a hearing on the merits in federal court.

During the 106th Congress, as Chair of the House Subcommittee on the Constitution & Civil Justice, the Hon. Charles Canady was the lead sponsor of H.R. 2372,[5] the Private Property Rights Implementation Act of 2000. Among other things, H.R. 2372 was designed to address the suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court. Most significant to this case, H.R. 2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, in order to ensure that property owners like the Petitioner in this case have a meaningful opportunity to have the federal courts decide their federal takings claims. On

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[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

March 16, 2000, H.R. 2372 passed the House of Representatives.

The Judiciary Committee's 2000 Report focused precisely on the consequences of *Williamson County* that underlie the instant appeal. The Report discussed the lengthy and expensive litigation required to pursue a taking claim through the state and then federal courts: for example, 14 years in *Del Monte Dunes*, and 13 years in *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).[6] The Committee also took note of the application of claim and issue preclusion defenses to bar federal taking claims.[7] The Report concluded: "The effect of the reasoning of these cases is that many property owners end up with *no opportunity* to have their Federal constitutional claims heard in Federal court."[8]

In 2005, the case of *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), and the Second Circuit's conflicting decision in *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118 (2d Cir. 2003), *cert. denied*, 73 U.S.L.W. 3211 (2004) (the undersigned counsel represented Santini), illustrated the procedural crisis that has resulted from the *Williamson County* state court requirement, and the concerns that have prompted Congressional proposals. In *Santini*, the Second Circuit in 2003 became the first federal court to

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[6] *Ibid.* at 6.

[7] *Ibid.* at 8.

[8] *Ibid.* at 9.

address the merits of a federal taking claim – which arose from events that occurred from 1991 to 1993. Even then, the Second Circuit, in allowing Santini to proceed, and allowing Second Circuit litigants henceforth to reserve their federal claim during state court proceedings, effectively affirmed that Santini had been *properly required* to proceed through six years of state court litigation before his federal claim accrued and could even be pursued in federal court. In *San Remo*, this Court overruled the *Santini* holding, 545 U.S. at 342-43, in favor of continuing the *Williamson County* regime.

As noted earlier, concern among members of Congress with *Williamson County's* anomalous consequences in general and then the *San Remo* holding in particular were then further reflected by work on the Private Property Rights Implementation Act of 2006 (H.R. 4772), and the Property Owners Access to Court Act of 2010 (H.R. 5624).

Thus, both judicial decisions and legislative efforts to rectify *Williamson County* highlight the fact that its state court requirement has operated to deny property owners their rights under the Takings Claim of the Fifth Amendment. A litigant can spend years in state court trying to ripen a federal claim, and then be met with an inability to access the federal courts to pursue a federal constitutional claim once the state court litigation has terminated.

The Petition for Writ of Certiorari filed by Mrs. Knick in October 2017 amply summarizes the flaws, anomalies, and injustices that have resulted from *Williamson County*'s state court litigation requirement. The rule (1) incorrectly focuses on what a state court

does with a taking claim, rather than the facts and whether the claim satisfies the substantive elements of takings jurisprudence (Pet. at 14-15); (2) is prudential, not jurisdictional, yet has caused wide confusion, conflicts, and inconsistencies for litigants and courts (Pet. at 15-17); (3) has the effect of extinguishing federal constitutional claims without a hearing on the merits (Pet. at 17); (4) is contrary to plainly expressed Congressional intent that property owners be provided a federal forum and a substantive adjudication of their federal constitutional claims (Pet. at 17-18); (5) is simply inconsistent with federal court removal procedure (Pet. at 18); and (6) presents takings claimants with a Hobson's Choice of procedural options that sometimes result in claims not being asserted at all (Pet. at 19).

Congressional concern about *Williamson County* as a procedural obstacle to the protection and vindication of private property rights has been exacerbated by the substantive curtailment of such rights represented in this Court's holding in *Kelo v. New London*, 545 U.S. 469 (2005). Though *Kelo* dealt with the constitutionally permissible purposes of so-called "direct" condemnation, while *Williamson County* deals generally with procedures for adjudicating "indirect condemnation" claims arising from excessive regulations and restrictions, it is no small matter that both cases arose from the Takings Clause of the Fifth Amendment to the U.S. Constitution, and have the effect of protecting governmental decision-making from challenges by private property owners, even though the Takings Clause is a statement of citizen rights *against* government overreaching. Put another way, the *Kelo* decision grants substantial deference to government

officials who declare that the use of eminent domain to assist private economic will have public benefits, while *Williamson County* effectively shields regulatory excess from challenges brought in federal court under federal law when, for whatever reason, a state court has failed to regard the federal Taking Clause as a significant protection of private property rights. *Williamson County* and *Kelo* both exemplify what Professor Gideon Kanner has called, "The invidious disparity between treatment of constitutionally aggrieved property owners seeking judicial redress" for claims arising from the federal Takings Clause, and "persons seeking redress for other constitutional rights. . . ." G. Kanner, "[Un]equal Justice Under Law: The Invidious Disparate Treatment of American Property Owners In Takings Cases," 40 Loy. L.A. L. Rev. 1065, 1070 (2007).

The procedural confusion and unfairness of *Williamson County,* by itself and in combination with the impacts of *Kelo v. New London*, have left the scope of Fifth Amendment protection of property rights unclear and undetermined, and so have impeded Congress from examining what if any other procedural clarifications or amendments are warranted. Resolution of the conflicting interpretations of *Williamson County* will aid Congress, the Subcommittee on the Constitution and Civil Justice, and the Judiciary Committee in understanding its opportunities and obligation to protect the constitutional rights of property owners.

CONCLUSION

This Court should resolve the conflicting interpretations of the *Williamson County* state court requirement in a manner that will restore the rights of property owners to have a federal court adjudicate their Fifth Amendment taking claims and will provide guidance to Congress regarding the Supreme Court's understanding of the scope of constitutional protection of property rights.

Respectfully submitted

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